

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MEI-FANG LISA ZHANG, et al.

Plaintiffs,

v.

WEI-MAN RAYMOND TSE, et al.

Defendants.

No. 07-04946 JSW

**ORDER GRANTING MOTION TO
DISMISS COUNTERCLAIMS**

INTRODUCTION

This matter comes before the Court upon consideration of the Motion to Dismiss Counterclaims filed by Plaintiffs Mei-Fang Lisa Zhang, Bay Area Affordable Housing, LLC, Xue-Huan Gao, Yuan-Chun Zhang, Carol Jian Deng, and Hao Liang (collectively "Plaintiffs"). Having considered the parties' papers, the relevant legal authority, and the record in this case, the Court finds the matter suitable for disposition without oral argument. *See* N.D. Civ. L.R. 7-1(b).¹ The Court HEREBY VACATES the hearing set for August 29, 2008, and GRANTS Plaintiffs' motion.

BACKGROUND

On September 24, 2007, Plaintiffs filed their Complaint alleging that the Defendants, including Defendant Run Ping Zhou (a/k/a Flora Zhou) ("Zhou"), have engaged in a fraudulent

¹ In her opposition, Zhou asks that the Court dismiss the claims against her. Zhou has not filed a proper motion to dismiss and has filed an Answer. Therefore, her request to dismiss the claims against her is denied. That ruling is without prejudice to Zhou filing dispositive motions in the future.

1 scheme involving trading of foreign currencies.² On May 27, 2008, Zhou, proceeding *pro se*,
 2 filed an Answer and asserted a number of counterclaims against all of the Plaintiffs. In both her
 3 Answer and her Counterclaims, Zhou denies she engaged in any wrongdoing and asserts that
 4 the Plaintiffs have no basis to assert claims against her. (*See generally* Answer and
 5 Counterclaims.) Liberally construed, the counterclaims appear to assert claims of malicious
 6 prosecution.

7 ANALYSIS

8 A motion to dismiss is proper under Rule 12(b)(6) where the pleadings fail to state a
 9 claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In ruling on a Rule 12(b)(6)
 10 motion, the complaint is construed in the light most favorable to the non-moving party and all
 11 material allegations in the complaint are taken to be true. *Sanders v. Kennedy*, 794 F.2d 478,
 12 481 (9th Cir. 1986). The court, however, is not required to accept legal conclusions cast in the
 13 form of factual allegations if those conclusions cannot reasonably be drawn from the facts
 14 alleged. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994) (citing *Papasan*
 15 *v. Allain*, 478 U.S. 265, 286 (1986)).

16 As noted above, construing Zhou's allegations liberally, she appears to assert
 17 counterclaims for malicious prosecution. Under California law, the elements of such a claim
 18 are that the prior action: "(1) was commenced by or at the direction of the defendant and was
 19 pursued to a legal termination in his, plaintiff's, favor [citations]; (2) was brought without
 20 probable cause [citations]; and (3) was initiated with malice [citations]." *Sheldon Appel Co. v.*
 21 *Albert & Olier*, 47 Cal. 3d 863, 871 (1989) (quoting *Bertero v. National General Corp.*, 3 Cal.
 22 3d 43, 50 (1974)). Because this action has not terminated in Zhou's favor, even when the Court
 23 accepts the allegations in the Counterclaims as true, Zhou cannot, at this time, state a claim for
 24 malicious prosecution. Accordingly, Plaintiffs' motion is GRANTED.

25 When a complaint is dismissed for failure to state a claim, "leave to amend should be
 26 granted unless the court determines that the allegation of other facts consistent with the

28 ² Plaintiffs' allegations are summarized in detail in the Complaint and shall not
 be repeated here, because they are not necessary to resolution of this motion.

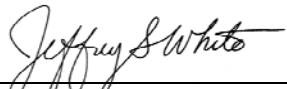
1 challenged pleading could not possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-*
2 *Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986); *see also Doe v. United States*, 58 F.3d
3 494, 497 (9th Cir. 1995) (a district court need not permit a plaintiff to amend his or her
4 complaint if it determines that the defects in the pleadings “could not possibly be cured by the
5 allegation of other facts”). Because Zhou cannot state a cause of action for malicious
6 prosecution against Plaintiffs unless and until this case is terminated in her favor, leave to
7 amend her counterclaims would be futile. Accordingly, the Counterclaims are dismissed
8 without leave to amend.

9 CONCLUSION

10 For the foregoing reasons, Plaintiffs’ motion to dismiss Zhou’s counterclaims is
11 GRANTED. The parties are FURTHER ORDERED to appear for a case management
12 conference on **Friday, September 12, 2008 at 1:30 p.m.** The parties’ case management
13 statements shall be due on or before **Friday, September 5, 2008.**

14 **IT IS SO ORDERED.**

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16 Dated: August 7, 2008

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19 JEFFREY S. WHITE
20 UNITED STATES DISTRICT JUDGE
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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

MEI-FANG LISA ZHANG et al,

Case Number: CV07-04946 JSW

Plaintiff,

CERTIFICATE OF SERVICE

v.

WEI-MAN RAYMOND TSE et al,

Defendant.

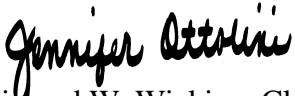
I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 7, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Molly Lau
Department of the Army
A FSC, 70th BSB
UNIT #15096
Camp Casey, APO AP 96224

Run Ping Zhou
South China Investment Inc.
3567 Kimberly Road
Cameron Park, CA 95682

Dated: August 7, 2008


Richard W. Wieking, Clerk
By: Jennifer Ottolini, Deputy Clerk